

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ELIZABETH SINES, et al., CIVIL CASE NO.: 3:17-CV-00072
September 14, 2020
CHARLOTTESVILLE, VIRGINIA
Plaintiffs, VIDEO SHOW CAUSE AND STATUS
HEARING

vs.

JASON KESSLER, et al., Before:
HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE
Defendants. WESTERN DISTRICT OF VIRGINIA

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1 (Proceedings commenced 2:10 p.m.)

2 THE COURT: Good afternoon. Call the case,
3 please.

4 THE CLERK: Yes, Your Honor. This is Civil Action
5 Number 3:17-cv-72, *Sines* and others v. *Kessler* and others.

6 THE COURT: Are the plaintiffs ready?

7 MS. PHILLIPS: We are, Your Honor.

8 THE COURT: Are the defendants ready?

9 COUNSEL: Yes. We are, Your Honor.

10 THE COURT: All right. Before we begin I will
11 remind everyone that under Standing Order 2020-12, the Court's
12 prohibition against recording and broadcasting court
13 proceedings remains in force. Attorneys' staff and any
14 members of the public accessing this hearing may not record or
15 broadcast it.

16 We are here today on two separate matters. First I
17 will take up the show cause hearing involving Defendant Robert
18 Ray. I will ask plaintiffs about the status of any steps
19 Mr. Ray may have taken toward compliance with Court Orders and
20 I would give him -- I would give him, if he were here, any
21 opportunity to respond.

22 Second, we have scheduled a status conference after
23 the Court Ordered the postponement of the trial and to have
24 some discussion regarding potential dates for proceeding
25 later.

1 Now, first, we're here on the contempt hearing for
2 Defendant Robert Ray, show cause why he should not be adjudged
3 in contempt of court. Let me start by recapping the main
4 background on this issue.

5 Plaintiffs filed a motion for a Court Order
6 requiring Mr. Ray to sit for deposition by videoconference
7 after he had failed to appear for a properly noticed
8 deposition on July 13, 2020.

9 On July 23, 2020, Judge Hoppe issued an order to Ray
10 to appear by videoconference for deposition by plaintiffs'
11 counsel on July 29, 2020. Judge Hoppe further warned Ray that
12 failure to comply with that order may result in a bench
13 warrant being issued for his arrest and transportation to this
14 judicial district to appear and show cause why he should not
15 be held in contempt of court. Nonetheless, on August 5,
16 plaintiffs advised the Court that Ray had failed to appear for
17 his deposition as Judge Hoppe had required.

18 On August 27, 2020, I issued an order directing Ray
19 to appear at this contempt hearing scheduled this date and
20 time to show cause why he should not be adjudged in contempt
21 of court on account of his failure to comply (internet
22 distortion) dated July 23, 2020. I ordered Mr. Ray to attend
23 this show cause hearing.

24 I also ordered Mr. Ray to do the following concrete
25 actions before this contempt hearing this afternoon:

1 One, I ordered him to contact the Clerk's Office by
2 September 7, 2020, to get log-in or dial-in information to
3 participate in this hearing.

4 Two, I ordered him to contact plaintiffs' counsel by
5 September 9, 2020, to get log-in or dial-in information to
6 participate in a rescheduled deposition that was set to take
7 place this morning, September 24, 2020, at 9:30 a.m. Eastern
8 Time. And I ordered him to appear by videoconference for that
9 rescheduled deposition by videoconference by plaintiffs'
10 counsel this morning, September 14, 2020.

11 I have been informed by the Clerk of the Court that
12 Mr. Ray did not contact the clerk by September 7 as required
13 to get log-in information to participate in this afternoon's
14 contempt hearing. Nonetheless, on September 10, the Clerk's
15 Office emailed him the information to participate in this
16 videoconference at his email address on file. He has not
17 appeared today, either; is that correct, Heidi?

18 THE CLERK: That is correct, Your Honor.

19 THE COURT: All right. I will also give the
20 plaintiffs an opportunity to present any arguments and
21 evidence in a moment. But am I correct that Mr. Ray neither
22 contacted you by September 9 to get log-in information for his
23 deposition, nor did you have the deposition this morning?
24 Asking plaintiffs' counsel.

25 MS. PHILLIPS: Yes. Thank you, Your Honor. This is

1 Jessica Phillips from Paul Weiss Rifkind Wharton & Garrison on
2 behalf of the plaintiffs. I will be handling the show cause
3 hearing on behalf of plaintiffs today and my colleague and
4 co-counsel Mike Bloch will handle the status conference.

5 And you are correct that Mr. Ray neither contacted
6 us as ordered on September 9, nor did he appear this morning
7 at 9:30 a.m. Eastern Time for his deposition. And, of course,
8 this is the third time now that Mr. Ray has failed to appear
9 for a noticed deposition, and the second time he's failed to
10 appear for a Court-ordered deposition.

11 THE COURT: Okay, thank you.

12 I will also note for the record that this Court's
13 August 27 order, Mr. Ray was provided the opportunity to file
14 any brief or response or information he would like this Court
15 to consider by September 9. He has not done so.

16 Accordingly, I am considering whether Mr. Ray should
17 be found in civil contempt in which sanctions are appropriate
18 and not any greater than necessary in order to coerce him to
19 compliance with the Court's orders. Namely, the July 23,
20 2020, order from Judge Hoppe, as well as my August 27, 2020,
21 order, which both have directed Mr. Ray to sit for a
22 deposition, among other things.

23 It would appear that, notwithstanding certain
24 earlier participation by Mr. Ray in this case, he has over the
25 past year increasingly decided to ignore his responsibilities

1 to plaintiffs and the Court.

2 With all that said, let's proceed since we have
3 plaintiffs and everyone else here, except Mr. Ray. Generally
4 it is the plaintiffs' burden to establish by clear and
5 convincing evidence another party's civil contempt.

6 Do you have any evidence you wish to present?

7 MS. PHILLIPS: Thank you, Judge Moon. Yes. We
8 would like to -- I'd like to present argument on each of the
9 prongs of the civil contempt standard, if I may.

10 THE COURT: Okay.

11 MS. PHILLIPS: Thank you. Of course, this is -- as
12 I said earlier, this is the third time now that Mr. Ray has
13 failed to appear for his noticed deposition in this
14 litigation. And in doing so, as you noted, he has yet again
15 flouted the Court's orders and shown no disregard for the
16 plaintiffs' time and resources and efforts. He has shown
17 absolutely no regard for his responsibilities as a civil
18 litigant.

19 And to be clear, Mr. Ray's deficiencies do not end
20 or begin with his failure to show up now three times for his
21 deposition. He is, in fact, in violation of at least four
22 Court Orders: ECF 379; ECF 728; the previous order on July
23 23, 2020, that Your Honor mentioned, which is ECF 814, the
24 order that Judge Hoppe issued requiring Mr. Ray to appear for
25 videoconference on the 29th of July; and then, obviously, most

1 recently, your order of August 27, 2020, ECF 848, Mr. Ray, as
2 you just noted, Judge Moon, failed to comply with each and
3 every provision of that particular order.

4 I'd like to spend a little bit of time talking to
5 you about his violation of ECF 329 and, in particular, ECF
6 728. Both of those were orders in response to two separate
7 motions to compel that the plaintiffs were required to file
8 because of Mr. Ray's discovery deficiencies. He did respond
9 to ECF 379, which was a November 13, 2018, order, although his
10 response to that order was entirely deficient. He responded
11 in no way to ECF 728. Judge Hoppe granted that motion on May
12 18, 2020, and set out a number of deadlines by which Mr. Ray
13 was supposed to provide plaintiffs with a second ESI
14 certification and a second deadline by which he was required
15 to provide our third party vendor in this case with all of his
16 devices and credentials for his social media accounts. He
17 failed to -- he failed to meet either of those deadlines. And
18 in response, plaintiffs filed a June 1, 2020, motion for
19 evidentiary sanctions and for the Court to issue a show cause
20 hearing. That particular motion for evidentiary sanctions is
21 still pending.

22 So again, plaintiffs believe that Mr. Ray is now in
23 violation of at least four distinct Court Orders. Mr. Ray has
24 had actual knowledge of the discovery orders that he violated.
25 Plaintiffs have repeatedly emailed Mr. Ray at the email

1 address that is on file for him and that was disclosed in the
2 responses that he submitted to plaintiffs' first set of
3 interrogatories. That email address is azzmador@gmail.com.
4 Plaintiffs have repeatedly served him with numerous copies of
5 Court Orders and also reached out to him at this address
6 numerous times regarding his failure to sit for his
7 depositions and with regard to his failures in discovery.

8 We have also called Mr. Ray numerous times at the
9 phone number that he disclosed in his interrogatory responses.
10 We've also reached out to him on a second phone number that
11 was revealed through discovery that he did not disclose to us,
12 and that was in part the subject of our March 11, 2020, motion
13 to compel.

14 Mr. Ray simply refused to respond. And what is so
15 unbelievably galling with regard to his failure to respond to
16 his responsibilities in this civil litigation is that he has
17 been active on social media using accounts that he failed to
18 disclose in the litigation. In particular, he's been
19 recording episodes of his podcast which is called the Crypto
20 Report and posting them on a website called DLive. And for
21 the record, that site is dlive.ev\azzmador.

22 Mr. Ray has also been posting archived episodes of
23 his podcast on the BitChute website, and he also has an
24 account called The Official Crypto Report on the social
25 networking website Telegram. So he is actively posting and

1 engaging on social media while refusing to abide by the
2 Court's Orders in this litigation. I don't think there can be
3 any doubt about plaintiffs' prejudice in this case.

4 Excuse me, Your Honor. You know, at the most basic
5 level, we've put an enormous amount of time, effort, and
6 resources on additional motion practice. As I mentioned, we
7 filed two separate motions to compel Mr. Ray to sit for his
8 deposition. We filed two motions to compel various other
9 forms of discovery. We have now had to file an evidentiary
10 sanctions motion, and, of course, we've engaged court
11 reporters and videographers to sit for Mr. Ray's deposition
12 each time to no avail, of course.

13 And, you know, this leads me to the -- arguably, the
14 largest prejudice for plaintiffs, which is that Mr. Ray is
15 still withholding a trove of documents that are responsive to
16 this litigation that are relevant to the conspiracy that
17 plaintiffs have alleged and have been developing evidence to
18 prove at trial over the course of the last two years. Mr. Ray
19 played a critical role in that conspiracy.

20 At the time of Unite the Right, Mr. Ray was a writer
21 for The Daily Stormer. It was the most visited and
22 influential hate website on the Internet at the time. Through
23 articles that he posted on Daily Stormer, Mr. Ray promoted and
24 facilitated the events in Charlottesville, he encouraged
25 followers to attend Unite the Right and to bring with them

1 torches, pepper spray, and shields. He was an active
2 participant on Discord. He told people of the events, that he
3 would be there gassing the counterprotesters, and he referred
4 to UTR as a war and not a party. And then, of course, he did
5 attend UTR and marched in the torch march, and, as he openly
6 admitted, on August 12 of 2017 used pepper spray to attack
7 counterprotesters, among other violent actions that he took.

8 In short, plaintiffs believe that Mr. Ray should be
9 held in civil contempt, and we believe he should be
10 sanctioned. In terms of the appropriate sanction, we would
11 request that the Court issue a bench warrant for Mr. Ray's
12 arrest. Your Honor's August 27, 2020, order indicated that
13 Mr. Ray's failure to comply with that order could result in
14 additional grounds of contempt, could result in escalating
15 monetary penalties, or could result in a bench warrant
16 directing the marshals to arrest Mr. Ray and hold him in
17 custody until he purges himself of contempt.

18 Respectfully, we believe that the final of those
19 sanctions is the most appropriate and necessary to actually
20 engage Mr. Ray and get him to participate in the litigation.
21 We just simply don't believe that there is any reason to think
22 that escalating monetary penalties will have any impact on his
23 willingness to engage in the litigation, and this is for a
24 couple of reasons.

25 First and foremost, we've already received monetary

1 penalties that has done nothing to encourage his involvement.
2 And there is also already a warrant out for his arrest in
3 Virginia on criminal charges relating to his conduct and his
4 actions at Unite the Right. Specifically, on June 4 of 2018,
5 a grand jury indicted him for maliciously releasing gas at
6 Unite the Right, and a capias warrant was issued for his
7 arrest on June 7 of 2018. He's actually listed in Albemarle
8 County as a fugitive. So plaintiffs' view is, given that
9 Mr. Ray is already determined to be a fugitive in Virginia,
10 escalating monetary penalties are not going to get him to
11 engage in the litigation. So we would respectfully request
12 that Your Honor direct the marshals to arrest Mr. Ray and to
13 hold him in custody until he purges himself of contempt.

14 And one final thing I'd just like to say is that we
15 do have an evidentiary sanctions motion pending against
16 Mr. Ray. We would respectfully submit that that motion is
17 ripe and should be ruled upon. Mr. Ray's egregious
18 behavior -- absolutely egregious -- even with regard to
19 comparable behavior from some of his codefendants and
20 coconspirators, you know, I think plaintiffs' view is that
21 Mr. Ray's behavior is even worse than what we've seen in other
22 civil contempt hearings, for example. But we believe that
23 evidentiary sanctions are warranted to fill the gap that has
24 existed as a result of Mr. Ray's refusal to provide us with
25 the documents and the accounts, the videos, and photographs to

1 which we are entitled.

2 And also, I'm very happy to answer any questions
3 that Your Honor may have about plaintiffs' position. But
4 again, since this is now the third time that Mr. Ray has
5 refused to show up for a Court-Ordered deposition, I think
6 nothing less than actually going and physically finding him
7 will work in this case.

8 THE COURT: Okay, thank you. I don't have any
9 questions.

10 MS. PHILLIPS: Okay.

11 THE COURT: I intend to issue a written opinion, but
12 I can determine now that I find Mr. Ray to be presently in
13 contempt of court.

14 The elements of civil contempt are:

15 1, The existence of a valid decree of which the
16 alleged contemnor had actual or constructive knowledge;

17 2, That the decree was in the movant's favor;

18 3, That the alleged contemnor by its conduct
19 violated the terms of the decree, and had knowledge (at least
20 constructive) of such violations; and

21 4, That the movant suffered harm as a result.

22 I find that all of his elements have been met by
23 clear and convincing evidence.

24 Upon my own review of the record and considering the
25 argument and facts presented here, there is no question at all

1 and more than a clear and convincing case that Mr. Ray is in
2 contempt.

3 First, Mr. Ray has not complied to the very basic
4 obligations of every party in a civil case to respond to
5 discovery requests, and, namely here, the obligation to sit
6 for a deposition.

7 There are two Court Orders of which Mr. Ray had
8 actual or constructive knowledge that were unequivocal and
9 directed clearly to Mr. Ray -- from Judge Hoppe on July 23,
10 2020, and from this Court on August 27, 2020 -- which ordered
11 Mr. Ray to sit for a deposition upon oral examination.

12 While he was previously represented by counsel, Ray
13 is a pro se litigant at this point, but that is no excuse.
14 All parties have an obligation to respond to discovery
15 requests as well as to comply with Court Orders.

16 Second, these were Orders in Plaintiffs' favor that
17 would vindicate their right to receive relevant discovery from
18 Mr. Ray.

19 Third, there is no dispute Mr. Ray did not appear
20 for either Court-Ordered deposition. He did not contact
21 opposing counsel as required, nor did he contact the Clerk's
22 Office to get information to participate in this hearing,
23 which is also required.

24 Mr. Ray has not attempted to tender any defense
25 either in writing or at this hearing today, and he is not here

1 today at his show cause hearing as ordered.

2 Fourth, by failing to appear at his deposition and
3 failing these other obligations, plaintiffs have not received
4 discovery to which they were entitled. Their ability to
5 develop and prosecute their case has been stymied. They have
6 also had to incur attorney's fees and costs to vindicate their
7 right to discovery.

8 I, therefore, find Mr. Ray in civil contempt of
9 court.

10 I will next address the issue of remedy.

11 Had Mr. Ray appeared or taken some steps to begin to
12 comply with the Court's and Judge Hoppe's orders, I would have
13 considered lesser measures to secure his full compliance, such
14 as monetary obligations, but Mr. Ray still (internet
15 distortion) case and this proceeding and in total disregard of
16 the Court's Orders.

17 Do plaintiffs have anything else you would like to
18 add on the issue of remedy, anything you haven't said?

19 MS. PHILLIPS: No, Your Honor, thank you.

20 (Interruption by the court reporter.)

21 THE COURT: Let me see. I'll start that paragraph
22 over.

23 Had Mr. Ray appeared or taken some steps to begin to
24 comply with the Court's and Judge Hoppe's orders, I would have
25 considered lesser measures to secure his full compliance, such

1 as monetary sanctions, but Mr. Ray is still absent from the
2 case and this proceeding and in total disregard of the Court's
3 Orders.

4 And I then asked plaintiffs' counsel if she had
5 anything else to say, which she now has responded that she
6 does not.

7 Unfortunately, as Mr. Ray has not seen fit to appear
8 today as ordered or to take any steps at all to comply, I see
9 no alternative but to issue a bench warrant for Mr. Ray's
10 arrest and have him transported to this district to be
11 detained until he purges himself of contempt by giving his
12 deposition.

13 That will issue shortly, along with a Civil Contempt
14 Order providing, again, the specific steps Mr. Ray can take
15 himself to purge himself of contempt.

16 All right. Next we'll take up the status conference
17 in the case.

18 On August 25, 2020, the Court removed the jury trial
19 from the Court's calendar in October in view of the health
20 risks presented by COVID-19 and the anticipated expansive
21 breadth and scope of the trial. In my order, I identified a
22 few preliminary issues that could assist the Court in
23 rescheduling the trial that I wanted the parties to be
24 prepared to discuss.

25 I will start with plaintiffs and then go around and

1 ask each of the defendant's counsel or defendants of any
2 input.

3 There are increasing numbers of in-person
4 proceedings in court, and jury trials are beginning to be
5 attempted in this district, although we have not had any, to
6 my knowledge. But COVID-19 still appears a significant
7 threat. Even though this trial will be postponed for months
8 and maybe closer to a year, the Court must plan to the extent
9 possible so that it would be held in the safest way possible.

10 Let's start with the non-COVID (internet distortion)
11 projected length of the trial. I would like first to hear
12 from the plaintiffs how many weeks you think you really need.
13 You had previously -- I think the case was previously set for
14 three weeks; is that correct? But I understand now you're
15 saying we need four weeks? Is it the plaintiffs' position you
16 need four weeks?

17 MR. BLOCH: Thank you, Judge. This is Michael Bloch
18 on behalf of the plaintiffs from Kaplan Hecker & Fink. That's
19 correct. We did go back and check our potential witness
20 lists, and we do think that four weeks would be an appropriate
21 projection for the length of the trial.

22 THE COURT: Okay. Are you basing that on the number
23 of witnesses, or how do you come to the four weeks? I just
24 had a trial that had 30-some witnesses, but it was a bench
25 trial, it was for two weeks, and we were through in about four

1 days.

2 MR. BLOCH: Judge, to preview the answer to one of
3 your later questions, we do all told project about 50
4 witnesses. And so that -- assuming that we will have a jury
5 trial, we assumed somewhere in the nature of two to four days
6 or so to pick a jury and about three weeks to move through the
7 witnesses.

8 THE COURT: Okay. Do the defendants have any
9 different ideas about that?

10 MR. KOLENICH: Your Honor, this is Jim Kolenich for
11 certain defendants. I guess I'm unclear. Are the plaintiffs
12 estimating four weeks just for their case in chief and jury
13 selection or is that an attempt to encompass defendants' case
14 in chief as well?

15 MR. BLOCH: That was our impression of the entire
16 case. Of our potential 50 witnesses, we assume some amount of
17 overlap in terms of the number of witnesses. So let me just
18 start with, in terms of our projection number of witnesses,
19 that includes all parties, plaintiffs and defendants, which we
20 assume will likely testify either in our case in chief or in
21 the defendants' case in chief. And so all told, parties plus
22 third parties, plus experts, we believe amounts to
23 approximately 50 witnesses in which case the four-week
24 projection was for everybody.

25 MR. KOLENICH: Understood. Thanks, Mike.

1 In that case, I think I'm comfortable with the
2 four-week estimate as well.

3 THE COURT: Okay, thank you.

4 It looks like the case will have to be delayed at
5 least until August or September of next year. And Heidi, did
6 you -- have you given them dates, possible dates for that?

7 THE CLERK: Yes, Your Honor. I gave some dates.

8 THE COURT: But you haven't agreed on any dates; is
9 that correct?

10 THE CLERK: No, sir. Nothing has come back as
11 agreed upon yet.

12 THE COURT: Okay. Well, I think it will have to be
13 that far off because, as you know, we haven't had any criminal
14 trials, either, and criminal cases have priority on the
15 docket. But I think if we can set this a year off and the
16 COVID situation is improved, maybe we can get it done.

17 But we calculated about 50 possible persons being in
18 the court, just parties and attorneys, if they are all there
19 at one time. And it would be helpful if you-all could figure
20 some way to stagger counsel or the parties being there, or
21 possibly even to appear by Zoom. The case that I recently
22 tried, a good number of the witnesses appeared by Zoom, and it
23 seemed to work -- I thought it worked out well. Of course, it
24 was not with a -- we were not dealing with a jury. But you
25 might give that some thought.

1 There are -- there are some discovery issues still
2 outstanding. We haven't heard any motions for summary
3 judgment yet, and I know, although we're putting the case off
4 for a long ways, it seems to me it would be good to take up
5 motions since discovery should have been completed by now. We
6 ought to take up motions for summary judgement not too far
7 from now because, if there are parties that should be
8 dismissed from the case, it would be helpful to get them out
9 of the case so that we would know what we were planning for by
10 way of a trial. So I don't want to put the motions for
11 summary judgement off up until just near the date of trial
12 like it might be in just a normal case. So you might think of
13 that once -- yes.

14 MR. BLOCH: Judge, I'm sorry.

15 THE COURT: Go ahead.

16 MR. BLOCH: I didn't mean to interrupt. This is
17 Michael Bloch.

18 THE COURT: I think you may be muted.

19 MR. BLOCH: Can you hear me now, Your Honor?

20 THE COURT: Yes.

21 MR. BLOCH: Can you hear me, Your Honor?

22 THE COURT: I hear you when you're speaking, I hear
23 you, but then I don't hear anything after that.

24 MR. BLOCH: Got it. Thank you, Judge.

25 With respect to summary judgement, the prior

1 scheduling order had a date of August 7 for summary judgement,
2 which was prior to Your Honor's continuing the case. One
3 defendant -- well, three defendants represented by Bryan
4 Jones -- League of the South, Michael Hill, and Michael
5 Tubbs -- moved for summary judgement. The rest of the
6 defendants elected not to file summary judgement motions. We
7 have responded to the League of the South motion. I believe
8 they are contemplating filing a reply as well as setting a
9 date for oral argument. But it's my understanding that the
10 date for summary judgement has passed, and I think we've
11 actually completed that stage, other than the resolution of
12 the motion by --

13 MR. HEIMBACH: Your Honor, this is Matthew Heimbach.
14 As a pro se litigant, I suppose I had missed the time stamp,
15 and that's actually one thing I wanted to bring before the
16 Court. I was going to file my motion for summary judgment and
17 then had noticed in the motion, as Mr. Bloch had announced on
18 August 7, if there's a continuance where I could file it now I
19 could file that with the Court because I believe it would be
20 appropriate given my involvement in the case to have a motion
21 of summary judgement.

22 MR. SPENCER: Your Honor, I would like to second
23 that sentiment. Throughout August I was responding to the
24 requested admissions from plaintiffs as well, and I feel like
25 we are now in a position where these summary judgement motions

1 can be filed. So if you could give us a reasonable deadline,
2 I can certainly meet that.

3 MR. BLOCH: Judge, this is Mike Bloch. From the
4 plaintiffs' perspective, we would oppose that. There is --
5 there was ample time to file summary judgement up until August
6 7. There was no indication that the trial date would be moved
7 at that point, other than defendants did file summary
8 judgement motions, and these defendants didn't. So this to me
9 feels opportunistic, and at this point all the defendants are
10 out of time to file summary judgement motions, as are
11 plaintiffs, for that matter.

12 MR. CANTWELL: If I could chime in on the motion for
13 summary judgment, I've been completely in the dark about
14 what's happening in this case. I'm at a correctional facility
15 in the middle of the COVID lockdown, and nobody has been
16 serving me with anything, despite the fact that I notified the
17 Court of my presence here back in February.

18 The first thing I got from the plaintiffs in this
19 case was the request for admissions which they sent me in the
20 middle of August. I only started getting court documents
21 towards the end of June, and so this is -- the deadline for
22 summary judgement is completely news to me. I've been in the
23 dark about this case since January.

24 THE COURT: Let me say for all the requests now for
25 summary judgement, those matters have been referred to Judge

1 Hoppe, and you'll take those up with Judge Hoppe. And if he
2 allows it, then he'll give you the time. He'll give you the
3 times within which you must file any motion. And I think
4 that's the best way to handle that. And of course -- well,
5 I'll just say previously these matters were referred to Judge
6 Hoppe, and so it's still in his hands. So that would be -- if
7 you wish to make a motion to file a summary judgement late,
8 you may take it up with him. All right.

9 But even so, what I was saying is I'd like to
10 resolve all motions like that as early as reasonably possible
11 without -- you know, there's no need to be in such a rush, but
12 I'd like to get it done so that we have all of that out of the
13 way and know what to plan on by way of trial.

14 One of the things that's really concerned the Court
15 is the size of the courtroom to handle a case of this size.
16 As I said, we think there will be at least 50 participants,
17 including lawyers and parties, and that's then, of course, we
18 have usually ten or so people connected with the Court that
19 would likely be in the courtroom. I mean, we do have the
20 potential for the public in a civil case to be moved down --
21 down to another court, another room in the building. So if
22 there's any public interest, which I would imagine there would
23 be, they could watch the proceedings from another space. But
24 if the COVID-19 is still a problem at that time, it's going to
25 be awfully difficult to maintain any six-feet distance and

1 practically impossible to try a case unless we find another
2 venue. And but we'll have to take that up as we get there.

3 Have the plaintiffs picked their counsel, selected
4 one of you to sort of be a point contact to assist in ensuring
5 compliance with health precautions going forward?

6 MR. BLOCH: Yes, Judge, this is Michael Bloch, and
7 I'm happy to serve that role for plaintiffs.

8 THE COURT: All right.

9 MR. BLOCH: I did have additional thoughts with
10 respect to the trial date if it would be appropriate for me to
11 chime in on that now, Your Honor.

12 THE COURT: Yes, go ahead.

13 MR. BLOCH: Judge, one of the -- one of the dates
14 that Ms. Wheeler had suggested as potential trial dates was
15 April 26 as a start date. We -- we discussed that internally.
16 That date works for all plaintiffs' counsel. I also spoke
17 with each defense counsel, and I believe that date works for
18 each defense counsel. I spoke individually with Mr. Spencer,
19 who I believe also has no objection to that. I haven't heard
20 from Mr. Heimbach or Mr. Campbell on that point.

21 But if that date is potentially agreeable with Your
22 Honor, that is a date that I think works for at least the
23 overwhelming majority, if not all of the parties, at this
24 point.

25 I also think with respect to the length of trial, I

1 will say that plaintiffs and defense counsel have throughout
2 this case worked well together in term of streamlining things.
3 I do expect that -- and I hope that will continue with respect
4 to streamlining this trial process. I think everybody here
5 shares the interest in getting this trial completed as swiftly
6 and efficiently as possible.

7 So if Your Honor is amenable to a potential April 26
8 trial date, that does work with the parties, and I do think
9 with respect to the length of trial and number of witnesses we
10 will be working together to streamline it as much as humanly
11 possible.

12 THE COURT: Well, you know, I personally don't have
13 much of any problem with the April date. My concern is, is
14 whether this pandemic is going to be abated enough to, you
15 know, try the case safely. That's the biggest problem. I
16 mean, we obviously -- we couldn't get 60 people in the
17 courtroom and maintain any distance, and it would just --
18 there would be 60 people, plus now we're talking about we
19 would have ten or so jurors I think to start out with. There
20 will certainly be a number of alternates.

21 The biggest problem for the Court is we set a case
22 like that for a month and we -- and it affects all the other
23 cases on the docket, too, hearings and that sort of thing, and
24 then we end up not being able to use, you know, that month.
25 And so it's really backed the calendar up. And if we are able

1 to try cases by April, we have to give the criminal cases some
2 priority. And that's -- that's the problem I have. I mean, I
3 would like to accommodate you, in particular, if you can do
4 it.

5 Heidi, I guess one thing we could do is set the case
6 in April and make a decision about sometime in January or
7 February. We would know sort of how the pandemic is going.
8 If we have a vaccine by then, we may be able -- may be able to
9 do something. We could tentatively --

10 THE CLERK: And we could also set it and do a second
11 position out further to hold for a second position, Judge.

12 MR. BLOCH: Judge, that sounds like -- that works
13 well for plaintiffs.

14 MR. SPENCER: I have no objection to that. I, too,
15 am fairly pessimistic about the notion that this pandemic will
16 be solved by the spring, to be honest, but I certainly don't
17 have any -- due to the pandemic, I don't have any major plans,
18 so I have no objection to a trial in the spring, or if you
19 have to do it a year from now.

20 THE COURT: Okay.

21 MR. HEIMBACH: Your Honor, this is Matthew Heimbach.
22 According to Dr. Fauci, or at CNN just yesterday, he estimated
23 that we won't see a reduction in the pandemic until the end of
24 next year. Now, like everyone else, I'd like to see this
25 resolved as quickly as possible, but if the experts in the

1 field are saying we're a year out, at least, from a
2 resolution, I'm more curious about safety precautions, as you
3 mentioned, for us, how many days defendants are to be there or
4 witnesses, or what we're going to be doing to make sure that
5 social distancing is taken into account and everyone is kept
6 safe on both sides.

7 THE COURT: Well, I think that major concern.

8 MR. BLOCH: Judge, this is Michael Bloch, and I
9 absolutely share everybody's concern with a time and manner
10 when it can be safe and healthy for everybody.

11 With respect to courtroom spacing, we have a number
12 of ideas and are happy to work with the Court and defendants
13 to achieve that.

14 In terms of time, one of the things that we're
15 obviously balancing from the plaintiffs' side is that this --
16 it's been over -- we're coming up on three years since this
17 case has been filed, and we'll be working into our fourth,
18 which is, obviously, a long time for everybody, but,
19 particularly, our clients who are hoping for a resolution as
20 soon as possible.

21 Just from experience having scheduled this
22 particular trial previously, it's been our experience that if
23 we don't -- if we aren't able to lock down dates, you know,
24 well ahead of time, given the number of parties and witnesses
25 and logistics that needs to go into scheduling the trial, then

1 we end up looking at a date much, much further down the road.

2 So I think your idea and Ms. Wheeler's idea of
3 setting an April date with a backup date later on in the fall,
4 as well as a status conference in January or February to see
5 if we're really on target for that date, makes a lot of sense.
6 If we are in a position to try it in April, and hopefully
7 we'll have more information about that in January or February,
8 I think everybody shares interest in getting it over with as
9 soon as possible.

10 THE COURT: Okay. Mr. Kolenich, did you have
11 anything to say?

12 MR. KOLENICH: I think I'm largely in agreement with
13 setting the date in April, understanding there might be a
14 backup date, a second position date, whatever, and, of course,
15 criminal cases take precedence. But I agree with plaintiffs
16 that the April date is best and that -- for a variety of
17 reasons, not the least of which this has gone on now for quite
18 some time and party defendants are also anxious to get full
19 resolution.

20 THE COURT: Well, okay. I'm willing to do that,
21 but, I mean, still I'm pessimistic that we're going to be able
22 to safely do it. And safety is going to have to be the
23 greatest concern here. So we'll do that and have a backup
24 date, too, Heidi, if you can work that out.

25 THE CLERK: Yes, sir. The first -- Mr. Bloch, I'm

1 looking through my email, too. My first date preference
2 was -- I think the April date was not the first date
3 preference. The first date preference, I can't remember what
4 it was, but I'll find it and we'll go back over that and see
5 if that works for everyone. It was further out than April.
6 April was the second date. I missed it in the email. The
7 first date was either August or November. So we'll look at
8 those dates again.

9 MR. BLOCH: Thanks very much. I think the dates
10 that I saw were April 26, August 2, and November 1.

11 THE CLERK: Yeah.

12 MR. BLOCH: The August 2 date did present a conflict
13 with some plaintiffs' counsel, which is why we ended up at the
14 April date.

15 THE COURT: Okay. Well, we'll do that.

16 Let me see if I have anything else.

17 Do any of the individual defendants who are not
18 represented have anything they would like to add, or is there
19 any defendants' counsel that hasn't spoken that would like to?

20 MR. SPENCER: Your Honor, I would personally prefer
21 the November dates to the August dates, but I'm willing to do
22 the April date, although I -- I simply don't -- I think it's
23 unlikely that the pandemic will be resolved by then.

24 THE COURT: Right.

25 MR. CAMPBELL: Your Honor, this is Dave Campbell on

1 behalf of Defendant Fields, and I agree with, if the Court
2 will permit us, putting the April date on the calendar and
3 having another backup one farther off.

4 THE COURT: Okay. All right. Well, we'll try the
5 April date but have the backup date, also.

6 MR. CAMPBELL: And I also have a conflict in August,
7 so if we do the backup date, perhaps, if we could avoid
8 August, at least the second week of August, that would be
9 preferable to me.

10 THE COURT: I think the backup date further -- as
11 far as possible would be best, because I think that's probably
12 going to be the one that we end up with.

13 THE CLERK: Yes, Your Honor.

14 THE COURT: So the November date would be good.

15 All right. Is there anything else that anyone would
16 like to bring up at this time?

17 MR. CANTWELL: Yes, Judge. This is Christopher
18 Cantwell.

19 I had written both to the plaintiffs and to the
20 Court seeking more time to respond to their request for
21 admission. I have jury selection tomorrow in my federal
22 criminal case here in New Hampshire, and the timing of that
23 was pretty inconvenient, as I had noted in my request.

24 THE COURT: All right. Can plaintiffs agree on a
25 little more time for him?

1 MR. BLOCH: This is Michael Bloch, Judge. We do
2 agree.

3 THE COURT: Okay. How much time do you need, three
4 weeks?

5 MR. CANTWELL: My trial is going to take about three
6 weeks. If we could do four, that would probably be better.

7 THE COURT: Okay. Say 30 days from today.

8 MR. CANTWELL: Excellent. Thank you very much, both
9 of you.

10 THE COURT: All right. I don't believe I have
11 anything else right now. If any of you do, you're welcome to
12 bring it up.

13 MR. BLOCH: Judge, this is Michael Bloch from the
14 plaintiffs. I have nothing else, unless any of my colleagues
15 have anything. I think that's it from our side.

16 THE COURT: All right. Anyone else?

17 MR. SPENCER: No.

18 THE COURT: All right. Thank you all for
19 participating today. I appreciate it, your cooperation. So
20 we'll recess now. Thank you.

21 (The proceedings concluded at 3:00 p.m.)

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CERTIFICATE

I, Mary J. Butenschoen, certify that the foregoing
is a correct transcript from the record of proceedings in the
above-entitled matter.

/s/ Mary J. Butenschoen, RPR, CRR

9/18/2020